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SIFMA's Compliance And Legal Society Annual Seminar Prepared Remarks Of U.S. Attorney Preet Bharara

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Thank you, Howard, for that kind introduction. And I want to thank SIFMA and all of the organizers for inviting me here and giving me the opportunity to speak.

It is good to be with this small and intimate group [of 1300].

As already mentioned, this is an incredibly interesting time to be a securities lawyer.

So much is going on in the world of securities enforcement and financial regulation lately, that it is hard to keep track. The last two years has seen, among other things, the passage of Dodd-Frank; the establishment of the Consumer Financial Protection Bureau; ramped up enforcement of the Foreign Corrupt Practices Act; and increased enforcement of the insider trading laws.

In our own District in Manhattan we have a significant trial going on in the insider trading area as we speak, about which I will say . . . absolutely nothing.

So, I could stand here and talk about our insider trading enforcement efforts or opine further on Dodd-Frank or address parallel proceedings or any one of a number of particulars with charts and graphs and statistics in hand, with reference to rules, regulations, and statutes.

But you have three days at this conference to pore over these matters; three days with a wonderful set of panels and panelists, set to explore every aspect of securities enforcement and new rulemaking and litigation strategy.

So instead this morning, I'd like to speak a bit more broadly and generally. I'd like to take a step back and talk for a few minutes about first principles. First principles of ethics. First principles of integrity. First principles of corporate culture.

While so many hundreds of professionals are gathered here for this conference, we would be remiss if we focused only on the mechanics of corporate compliance without acknowledging the importance of corporate culture.

Some of the most egregious securities frauds we have seen in my own district have sadly occurred at institutions with seemingly robust compliance programs, at least on paper.

And these are not fly-by-night outfits. We have seen egregious criminal conduct at some of the most prominent and powerful publicly traded companies, consulting firms, accounting firms, and even law firms. And of course, also on the part of high-flying money managers on Wall Street. Many of these miscreants are not mid-level. We have seen criminal conduct at the very top of the food chain.

Indeed, we keep witnessing some of the most educated, successful, and monied professionals in the country put their companies – not to mention their own liberty – at risk by engaging in flagrant and foolhardy illegal conduct in the market.

Some of these people have already made more money than could ever be spent in one lifetime; and achieved more impressive success than could ever be chronicled in one obituary.

To be sure, corporate culture is not dispositive and is no panacea. To be sure, there are bad apples everywhere, but an apple is more likely to rot in certain climates than in others.

And in too many places and in too many quarters, there seems to have taken root a culture of minimalism – by that, I mean a culture of merely aspiring to the minimum: doing merely the minimum required to avoid an enforcement action or a criminal charge, rather than focusing affirmatively on doing the right thing, staying comfortably clear of the line, and earning a robust reputation for integrity and honesty.

I hope that you agree that the most successful and prominent institutions in the world – whose failure can threaten the entire economy – should always aspire to more than the minimum.

Now, before going any further in that vein, let me tell you about our first principles in the U.S. Attorney's Office in the Southern District of New York.

You should expect from us what I expect every day from every Assistant in my office – engagement in the wise and just exercise of discretion and judgment.

I expect the AUSA's in my office to be open-minded, fair, and supremely principled in how charging decisions are made and how dispositions are handled. At the same time, I expect them to be tireless in discharging the duty that the taxpayers pay them to perform.

We should be fearless in bringing righteous cases no matter the public outcry, and we should be fearless also in walking away from cases no matter the public outcry, in the opposite direction. We bring scores of securities fraud cases every year; and we also end up walking away from cases because to bring them would be against the evidence and against the interests of justice. And that is as it should be.

In everything we do, you should expect us to exercise sound discretion and judgment and to remember always that our goal is not to win, but to do the right thing, for the right reasons, in the right way. In a word, to do justice.

And when we fail in that sacred obligation, we should, rightly, be held to account.

Now let me say three more specific things about how we try to go about doing our job as federal prosecutors investigating the financial industry, consistent with those principles:

First, we are not – despite what some so-called pundits aver – rushing to expand criminal liability into heretofore "gray areas."

Among other things, we do not have the time, energy, resources, or inclination to push the envelope on criminal liability.

Good faith, moreover, is and always has been a full defense to criminal prosecution.

People should have notice of what conduct is illegal, and we only target those who knew full-well that they were breaking the law.

We are not in the habit of prosecuting individuals who in good faith came close to the line.
But, those who have galloped over the line; who have repeatedly made a mockery of market rules; who have converted a legitimate enterprise into an illegal racket, they have done something wrong and will not get a pass.

Second, contrary to some other suggestions, we are not anti-business or anti-Wall Street. We bring specific charges against specific targets; we don't issue reports or engage in fishing expeditions.
Sometimes financial institutions are our targets; other times they are themselves victims. And our record of cases bears that out as well.

More specifically, as I have said many times, there is nothing inherently wrong or bad about hedge funds or expert networking firms or aggressive market research, for that matter. Nothing at all.
But, if a firm has effectively made criminal activity its business model, then business as usual has to stop. Or the consequences, as dozens of defendants have now discovered, will be severe.

Third, we are sensitive to the delicate nature, and special circumstances, of investigations into financial institutions. We have to be.

We understand that commencement of an investigation into a business, especially a financial institution, is like rolling a grenade through the front door.

And so we spend a lot of time discussing in our office the right way to proceed in white collar investigations, given the existence of vulnerable and innocent employees and shareholders – who are so often left holding the bag when things go south.

But, that said, while we are sensitive to collateral consequences and do not ever want to inflict undue harm during a legitimate investigation, no one should expect immunity from inquiry, because no one is above the law.

When there is smoke, especially lots of smoke, fire fighters tend to show up at the scene, and they investigate. It would in fact be irresponsible if fire fighters were not dispatched. The same is true of us.
If we have reason to believe that there is substantial evidence of criminality; if we have reason to believe that evidence might be destroyed; if we have reason to believe that we are being stymied in our investigation, we will take whatever steps are necessary in the interests of justice, some of which will necessarily be painful for the institution in question.

And let me make one modest business point. If yours is an institution so fragile that the mere issuance of a subpoena or performance of a court-authorized search might destroy your entire business, then it is incumbent on you to be even more careful and more scrupulous than everyone else. That is common sense and smart business practice.

So, that is what you have a right to expect from federal prosecutors investigating securities fraud, or any type of white collar crime for that matter.

Now, let me go back to what I started to talk about a few minutes ago – first principles. What do I mean by first principles? I am speaking in very basic and fundamental terms about integrity and honesty and fair dealing.

And I have found, over time, that there is never any redundancy in repeating and reinforcing the need for, and importance of, integrity in any enterprise. Simple things, in fact, bear repeating.

I think we too often assume that everyone in our orbit is like us, that everyone understands the central importance of integrity; we too often presume that everyone cares about it; we too often think that just because the boss has a well-known reputation for integrity that even the newest and youngest hires – who are especially vulnerable to all the financial pressures to perform and outpace the competition – will come to understand (and obey) that ethic through some process of osmosis.

But I'm not sure those are always valid assumptions. Reinforcement of the basics is absolutely essential.
And the foremost business minds and leadership experts agree on this point.

Here is the estimable business Professor Walter Bennis, who has written many books over the years for business leaders. In one, he writes this:

"One thing that has become clearer than ever to me is that integrity is the most important characteristic of a leader, and one that he or she must be prepared to demonstrate again and again. Too many leaders – corporate heads but church officials and leaders in countless other fields as well – forgot that they were under some scrutiny and that they could be called to account at any time. They forgot that something's being legal doesn't mean it's right."

Note, by the way, that Professor Bennis did not say that leaders must be prepared just to talk about integrity again and again. They must be prepared to "demonstrate" it again and again. Actions, as usual, speak louder than words.

And if you ever find yourself counseling a client or working at a firm where the basic concepts of integrity and honesty and fair dealing are not repeatedly discussed and demonstrated; where they are not at the core of the compliance curriculum; where they are thought to be too naive, simplistic, or well-understood to be reinforced with frequency, then I submit to you that there is already something amiss; there is already the seed of trouble.

The best-conceived compliance policies and practices in the world will be too weak to stave off scandal if the core principles are not internalized, if there is not – from the top – a daily drumbeat for integrity.

The particular phenomenon that should worry and trouble people is the impulse to walk the line, to aspire to the bare minimum.

Let me share an anecdote. Recently, I have been taking the time to speak to prominent and prestigious business groups, trade associations, and business schools.

I tell them some of what I am telling you now – that there is a line between what is legal and what is not – a line that is dangerous to get close to and possibly criminal to cross.

And I have been struck by a question I have been asked on more than one occasion.

It goes something like this: "Mr. Bharara, you've talked about making sure you don't cross the line and that it is dangerous to wander too close to the line. So, exactly how far from the line do you recommend people stay?"

It is asked like it is a geometry problem. I am tempted to say, oh, about 3 ½ feet should do the trick.
I guess it is not an unfair question, given what my thesis is – but I am always a bit taken aback. I answer by explaining that I disagree with the premise of the question; that the orientation of the question is unfortunate and off-base; that if you are single-mindedly focused on walking the line, you are bound to end up afoul of regulators, and God forbid, criminal prosecutors.

Even more dangerous perhaps, you are sending a message to every other person at the firm that line-walking is a good idea. That can work for a while, but people will invariably miscalculate and bad things will invariably follow.

Now, those questions came during informal talks to current and future business people.
But I have a feeling that there are people in this room who have been asked a version of that question at some point by some client – how close to the line can we go? Is the loophole big enough for us to be safe? Is the worst case scenario a financial penalty, and if so, shouldn't we just take the risk on a cost-benefit analysis?

If that is an institution's orientation, I submit there is already danger ahead.

A single-minded focus on remaining an inch away from the legal line is just asking for trouble. It is a dangerous thing to walk the line – and to train others to do it.

It's like a driver constantly trying to game just how close to the legal alcohol limit he can come without getting a DUI. Now, one can do that.

But how long do you think before that driver gets pulled over?

How long before that driver blows the legal limit?

And how long before that driver hurts someone on the highway?

Aspiring to the minimum is a recipe for disaster. Just like my office must be about more than obtaining convictions, financial institutions must be interested in more than just making money and maximizing profit in the short term. As I know you agree, those goals have to be reached honestly and honorably and on the right side of the law.

This is not to say that business – financial institutions or otherwise – shouldn't be maximizing profit for shareholders and investors; of course they should. But they should always understand the risks they are undertaking when they walk the line.

Here's another business school professor, Noel Tichy, in his book, *The Cycle of Leadership*. This is what he writes: "Successful Leaders add value. No matter what level or what type of organization, the true measure of a leader is whether he or she has made the assets under control more valuable today than they were yesterday. A leader is given stewardship over assets, in the form of people, capital, information, and technology. Their job is to make them more valuable and to keep making them more valuable into the future."

When your clients embark on questionable practices, they add risk to the books; they risk making the assets of the organization worth considerably less; and they are adding a potentially catastrophic liability.
This thinking has to be part of the culture of the place.

Profound personal integrity – repeatedly demonstrated and openly valued – is absolutely crucial; it should be the coin of the realm.

People have to say when they hire folks how important integrity is; and they have to look for it, and screen for it.

And then you have to say often how important integrity is, and demonstrate it often as well.
It does not suffice for a leader to give a pro forma admonition to behave honestly.
It does not suffice to require training sessions in the minutiae of the regulatory structure.
It does not suffice to have strong compliance programs that are fly-specked by a hundred lawyers.
People need to know and feel it in their bones that the bosses will not tolerate lapses in integrity; that they will be disappointed and angry at lapses in integrity; that they will not look the other way just because someone is making them money in the short term.

Whether one runs a U.S. Attorney's Office or a giant corporation or an investment bank or a hedge fund, everyone – from the mailroom to the boardroom – needs to understand and feel it in their bones that the bosses care about integrity.

And they need to understand that their deputies feel the same way.
And that the middle managers feel the same way.
And that every supervisor feels the same way.

As you may know, we do a lot of securities cases in my office. But notwithstanding the flourishes of the occasional journalist, I am not the sheriff of Wall Street; in many ways, you are.
Long before an office like mine commences an investigation or issues a subpoena, people like you in this room will likely have had innumerable opportunities to guard against corruption.
You will have had opportunities to establish better practices, better self-policing, better transparency, and to otherwise foster an ethic of integrity, candor, and responsible restraint in the financial industry – and to convince any clients who need convincing that this is usually also just good business.

The disturbing truth is that in the shadow of most massive frauds are lurking all manner of enablers – people who were helpful either to the perpetration of the fraud or to its concealment.

Part of your job is to disable these enablers and ring the alarm bell early – by shouting from the hilltops that business catastrophe awaits if attention is not paid and action is not taken.
The enablers are the ones who dutifully attend training sessions and obediently affix their signatures to compliance policies, while thinking to themselves: these rules are for the birds; these rules are just window-dressing; these rules are just something to showcase to prosecutors and regulators should, one day, the need arise.

Figure out who those people are. Find out who they are and rehabilitate them or get rid of them. They are quietly adding risk to your books; they are invisibly enlarging your liabilities.
They are ticking time bombs. And you cannot afford to wait until they are sued by the SEC or arrested by the FBI.

In fairness, sometimes these time bombs are ticking in silence and in secret, only to be revealed when handcuffs and arrest warrants materialize.
But often people know something is awry. Often people know something is amiss. There are signs; there are red flags. Sometimes those flags are downright crimson.
Do not ignore them, and do not let them be ignored – just because that person is a great earner; or has a terrific stock-picking record; or is deemed too valuable to the bottom line. No single person is more valuable than the institution itself.

A familiar pattern is repeated again and again, as insiders sometimes fail to stand up or to sound alarms and thus too often create (or tolerate) the conditions precedent for corporate corruption – because there is lip service to strong "compliance" but no commitment to a strong culture. It happens again and again:
Someone provides the comfort of a professional opinion that nudges up against the edge of legitimacy;
Or someone aggressively exploits a vagueness in the tax code that pushes the bounds of propriety;
Or someone creatively manipulates the numbers under an accounting theory that strains the laws of mathematics.

It happens every day.

Someone pushes the envelope or looks the other way or just fails to do his job as a professional. And time goes by and eventually the envelope-pushing gets more and more aggressive and the controls get less and less strict, and then finally the bad stuff really hits the fan. The firm collapses. Or there are charges, and then the firm collapses.

And thousands of Monday morning quarterbacks – at the firm, on TV, and in Congress – wonder aloud what the heck happened.

But long before criminal prosecutors enter the picture, forward-thinking lawyers and professionals like you can play a role – over time – in fighting off the creep of corruption that is keeping prosecutors and regulators so busy as we speak.

Unfortunately, with the economic pressure to perform higher than ever, and with enforcement resources taxed to their limit, cultures conducive to corruption can develop with relative ease. I have seen it – time and time again. And we have the convictions to prove it.

At the end of the day, we are all on the same side.

You and your clients are in this business because you believe in the market. We believe in the market too. But efficient markets depend on good information and honest dealings.

A cheater – someone who trades on inside information, who manipulates the market, or makes misrepresentations – cheats not simply the market, he cheats your clients individually and offends the principles of the market that your clients presumably live by and make their living on.

In many ways, prosecutors like me are not your adversary or antagonist or even your conscience; we are indispensible partners in your clients' profession – helping them to do what they do best to better our society, to efficiently allocate capital and resources to their best use.
We all have an interest in deterring crime, in maintaining the integrity of our markets, and in doing so with fairness and wisdom.

And that is why I am so pleased to be here this morning with this group.
I truly believe that much of the solution lies in the wisdom and integrity of the bar, this bar – the front-line counselors for the most powerful, prominent, and influential financial institutions in America.
Part of my hope and faith in your salutary role derives from my own abiding faith in the noble ideal of the legal profession.

I often say that there is no one better situated to promote equality, preserve liberty, and prevent cruelty than the person who has genuinely dedicated himself to becoming both a master and a servant of the law.
Add to that the power to steer corporate actors towards a permanent course of integrity and honest conduct.

I believe there is a material difference between the good lawyer and the great lawyer, and I hope more aspire to greatness. Every good lawyer knows how to defend zealously against charges, once brought.
But it is the essential ability of the great lawyer – a counselor in the finest tradition – to render unthinkable the bringing of charges in the first place. And not by being a clever student of legal loopholes or by earning a reputation for scorched-earth or ad hominem litigation or by papering the files for a future advice-of counsel defense.

That may be great lawyering, but it is not being a great lawyer.

Unlike the merely good lawyer, the great lawyer understands that charges are rendered unthinkable when the client's conduct and character have been rendered unimpeachable.

Unlike the merely good lawyer, the great lawyer understands that the most important advocacy often takes place in the boardroom, rather than the courtroom.

Unlike the merely good lawyer, the great lawyer knows it is sometimes more productive to direct the harshest words to the obstinate client, rather than the aggressive investigator.

The great lawyer abhors obstruction, not merely because of the potential effect on a prosecutor's decision in charging or a judge's decision in sentencing, but because obstruction is an affront to the rule of law and is deeply offensive to any officer of the court.

The great lawyer earns not just respect, but genuine admiration – from the Government, the Court, and the client – and that reputation, over time, helps not just one client in one case, but every client in every case. And along the way, the great lawyer – in part, by setting an example – plays a vital role in setting a course for integrity and therefore long-lasting and stable success for the client wise enough to pay heed.

And so the truly great lawyer – motivated by conscience, guided by principle, and empowered by training – can serve as the greatest antidote against scandal and corruption.

In the end, the good lawyer makes a living; the great lawyer makes a difference.

And it is an honor indeed to be among so many great lawyers here this morning.

Thank you.

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